**BEFORE THE**
**OFFICE OF ADMINISTRATIVE HEARINGS**
**STATE OF CALIFORNIA**

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| In the Matter of:<br><br>JOHN "JACK" S.,<br><br>Claimant,<br><br>vs.<br><br>WESTSIDE REGIONAL CENTER,<br><br>Service Agency. | OAH No. 2011100711 |

# DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 19, 2012, in Culver City.

Claimant was represented by his mother and father.[1]

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (Service Agency or WRC).

The documentary and testimonial evidence described below was received, and argument was heard. The record was closed and the matter was submitted for decision on March 19, 2012.

## ISSUE

Whether Claimant is eligible for regional center services on the basis of autism or the "fifth category" (disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation).

[1] Claimant and his parents are identified by titles or first name and initials to protect their privacy.

## EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits RC1-RC12; Claimant's exhibits 1-12.

Testimonial: Deborah Budding, Ph.D., ABPdN, ABN; Mayra Mendez, Ph.D., and Claimant's mother.

## FACTUAL FINDINGS

1. Claimant is a 15-year-old boy who was born in April 1996 and lives with his parents. In June 2011, Claimant's parents requested regional center services for Claimant. On or about September 20, 2011, the Service Agency sent Claimant's parents a letter and Notice of Proposed Action notifying them of its determination that Claimant is not eligible for services. On or about October 17, 2011, Claimant's parents filed a fair hearing request, on Claimant's behalf, to appeal the Service Agency's decision. This hearing ensued.

2. Claimant's parents contend that their son should be found eligible for regional center services on the basis of autism or the fifth category.

*Claimant's Background*

3. Claimant is currently an eighth grader at Village Glen School, a non-public school, in Sherman Oaks. He receives special education services in the eligibility category of Emotional Disturbance (ED). He has received special education services since the first grade. He also receives AB3632 mental health supports.

4. Claimant has a history of average to above-average academic achievement. He is described as a very bright, inquisitive, and articulate student, and artistic and talented. He takes clips from animated characters and sets them to music and puts his videos on YouTube.

5. Claimant had no delay in his early language development. His first words were spoken at 12 months. An assessment from November 9, 2000, reported that Claimant's expressive and receptive language was intact and he was able to clearly articulate his wants and needs. During a neuropsychological evaluation in 2003, Claimant, who was in kindergarten, was observed to be "talkative, often describing characters from his favorite computer game" and "he also imitated their voices when he spoke to the examiner." He was observed in his classroom pretending to be a guard and spoke into an imaginary walkie-talkie in his hand. Results on the Vineland Adaptive Behavior Scale (Vineland) indicated Claimant's communication skills were at age level. He could maintain social conversations and give information about himself. (Claimant's Exhibits 2, 4.)

6. (A) Claimant had a psycho-educational assessment in 2006. Claimant's cognitive abilities were assessed with the Cognitive Assessment System (CAS), which measures levels of cognitive functioning and is especially appropriate for children who may have attention-deficit hyperactivity disorder. Results of the CAS indicated Claimant's cognitive abilities were in the average to high-average range. However, he displayed significant difficulties with tasks that required concentration and attention as well as with tasks measuring processing speed. (Claimant's Exhibit 4.)

(B) Claimant was reported to be "able to communicate using short phrases, simple sentences and compound sentences," and "to follow three-step directions with prompting and redirecting." Results of the Woodcock Johnson Language Survey indicated Claimant demonstrated "fluent English oral language skills when compared to the range of scores obtained by others at his age level," and he would find "oral language demands of age-level tasks manageable." During conversation, Claimant was articulate and methodical in his responses on topics of his choice, such as caricatures, personal drawings, and super-heroes. He rarely engaged in spontaneous speech and his responses on topics other than his preference lacked detail. Claimant displayed difficulties taking turns during conversation. He "often spoke in a very formal matter [sic] and rarely displayed changes in voice during conversation except when he was observed angry and upset." He displayed some difficulties reading nonverbal cues from his peers and adult supervisors, often leading to withdrawal, social isolation, and peer altercations.

(C) Results from the Asperger Syndrome Diagnostic Scale (ASDS) indicated Claimant's "probability of Asperger's Syndrome ranged from the 'likely' range to 'possibly' range." On the ASDS language subscale, Claimant "was reported to talk excessively about a favorite topic which may hold limited interest for others (caricature drawing, history topics), use words or phrases repetitively, display a peculiar voice characteristic (monotone), and experiences difficulties in beginning and continuing a conversation."

7. Claimant has a long history of emotional and behavioral problems. He attended three different preschools because of behavioral problems, including inattention, distractibility, difficulty with peer relationship, rage outbursts and aggression. Claimant was diagnosed with Attention Deficit Hyperactivity Disorder when he was four years old. He was diagnosed with Childhood Onset Bipolar Disorder when he was six years old. Claimant's challenging behaviors (e.g., throwing objects, hitting/punching peers) continued in kindergarten and first and second grade. His behavior problems significantly increased in March 2006, prior to changes in his medication, with more frequent emotional outbursts, aggression, and withdrawal for the entire day.

8. In May 2006, Claimant was referred to the Department of Mental Health for an AB3632 assessment due to emotional and behavioral problems. His problems at the time included mood instability and aggressiveness towards others, poor social skills

and peer relationships, oppositional behavior, and inattention and distractibility. Claimant was found to meet the eligibility requirements of AB3632 for mental health services. He was found to have the following DSM-IV diagnoses: Asperger's Disorder, Bipolar I Disorder, Attention-deficit Hyperactivity Disorder (combined), Learning Disorder NOS, and Phonological Disorder. (Claimant's Exhibit 5.)

9. From the ages of 10 to 14, due to extreme physical aggression, Claimant attended residential schools in Texas and Colorado. In January 2007, Claimant was placed at Meridell Achievement Center in Texas, which is a residential school for children with emotional disturbance. He attended Meridell for approximately six months and then transferred to another residential school, Forest Heights Lodge in Colorado. Claimant attended Forest Heights Lodge for three years until he reached the maximum age for the school. Claimant returned to his parents' house in 2010. He was out of school and placement for six months, from June to October 2010. During that time, Claimant's parents and the local school district were engaged in a due process proceeding regarding the appropriate placement for Claimant. Ultimately, Claimant was placed at Village Glen non-public school starting in November 2010.

10. In June 2011, Claimant's parents requested regional center services for Claimant. Claimant was referred to the Service Agency by Village Glen. The Service Agency completed a Psychosocial Assessment on June 3, 2011, and referred Claimant for a psychological assessment.

*Evaluation by Carol Kelly*

11. Carol Kelly, Ed.D., is a licensed psychologist who performed a psychological evaluation of Claimant on June 23, July 29, and August 16, 2011. The purpose of the evaluation was to clarify Claimant's diagnosis and to assist in determining his eligibility for regional center services. Dr. Kelly reviewed records, administered tests, observed Claimant in his classroom, and interviewed Claimant's parents, his teacher, and a school administrator. Dr. Kelly prepared a written report of her findings and conclusions.

12. When Dr. Kelly visited Claimant's classroom, the teacher described Claimant as "a child who 'sleeps all day.'" From the time he arrives in the morning, he lays his head on his desk and sleeps until it is time to leave. Claimant told his teachers that he is up most of the night making videos and eating. When he is not sleeping, he refuses to do any of the class work. Claimant has his own separate cubicle, away from the other students, facing the wall and not toward the teacher or students. His teacher describes him as a student who is "very below grade level but extremely bright." The teacher reported that there were three recent episodes of aggression by Claimant toward her, his behavioral aide, and another student. His behavior is described as "quite volatile." Although other students are said to enjoy his company, Claimant claims that no one likes him. He interacts with the other students to show them his cartoon drawings, which the other children enjoy.

13. Dr. Kelly administered the Wechsler Intelligence Scale for Children-IV (WISC-IV) to measure Claimant's cognitive functioning. Dr. Kelly concluded that Claimant's scores on the WISC-IV are not considered valid because of his resistance throughout the test session. Claimant refused to perform the Wide Range Achievement Test-4 (WRAT-4), which is a test measuring academic skills. When Dr. Kelly observed Claimant in his classroom and interviewed his teacher, the teacher reported that Claimant does not do any academic work in the classroom. Dr. Kelly concluded: "It is difficult to know his level of cognitive and academic functioning because of his lack of involvement or effort on any tasks of that nature."

14. Dr. Kelly measured Claimant's adaptive behavior functioning using the Adaptive Behavior Assessment System - Second Edition, Adult Form (ABAS-II). Claimant's general adaptive composite score was rated within the lower limits of the mildly delayed range. He was within the mildly delayed range in conceptual and social skills, and he was within the moderately delayed range in practical skills. Dr. Kelly opined, "His lowered scores are thought to be the result of his mental health issues which are significant and likely impact his adaptive functioning."

15. Dr. Kelly interviewed Claimant's father using the Gilliam Autism Rating Scale - 2 (GARS-2). Father's responses reflected a score of 67, indicating that the probability of autism fell within the "unlikely" range (a score of 69 or less). Regarding stereotyped behaviors, Claimant reportedly often flaps his hands in front of his face. Dr. Kelly did not observe that behavior during the three times she met with Claimant. When Claimant is angry, he reportedly tries to injure himself by punching himself in the head. Claimant is a compulsive eater, who gorges himself and appears to eat to self-soothe. Regarding communication, Claimant was reported to have talked at an early age. Father reported that Claimant has always had peculiar speech and that when talking, he will start and stop a lot. It is hard for Claimant to tell a coherent story. Claimant does not avoid eye contact when he is being spoken to or when his name is called. Regarding social interaction, Claimant has always craved social interaction and friendship but has had difficulty finding someone who would engage him. Claimant is reported to sometimes laugh for no apparent reason. When questioned about it, he will say he was talking to himself. Claimant is sometimes unreasonably fearful, such as if he hears a loud noise; he works himself up to the idea it is a ghost. Claimant perseverates with his interests, such as cartoon characters and computer drawing.

16. Dr. Kelly was unsuccessful in her attempt to interview Claimant using the Autism Diagnostic Observation Schedule - Module 3 (ADOS). Claimant refused to answer most of the questions. He only wanted to talk about his agenda, except for telling Dr. Kelly a story from looking at a picture; the story turned out to be about himself.

17. (A) Dr. Kelly opined that Claimant has a history and continues to present with characteristics to support a diagnosis of Asperger's Disorder. (The diagnostic

criteria are set forth in Finding 25, below.) Claimant met the first criteria of "qualitative impairment in social interaction" in two respects. First, by his failure to develop peer relationships appropriate to developmental level. Records and parent report indicate that this has been an on-going problem for Claimant. He does not appear to know how to approach peers in an appropriate manner. He exhibits difficulty in reading and understanding social situations. Second, by his lack of social and emotional reciprocity. Claimant "interacts on his own terms and about his own interests and lacks the back and forth interactions required in building social reciprocity."

(B) Dr. Kelly found that Claimant met the second diagnostic criteria for Asperger's Disorder of "restricted repetitive, and stereotyped patterns of behavior" in two respects. First, he has an encompassing preoccupation with one or more stereotyped patterns of interests that is either abnormal either in intensity or focus. Claimant appears to have an excessive interest in designing his animated video clips which he shares on YouTube. He reported to his teacher that he stays up late at night doing that. He also spends a good portion of time in the classroom (when he is not sleeping) listening to music from animated or cartoon programs. Second, he has stereotyped and repetitive motor mannerisms. Dr. Kelly did not observe this but Claimant's father reported that he often sees Claimant flapping his hands in front of his face.

18. Based on her evaluation of Claimant, Dr. Kelly concluded that Claimant has a diagnosis of Bipolar Disorder Not Otherwise Specified (296.80) (Per history) and Asperger's Disorder (299.80). Dr. Kelly explained her conclusion as follows:

> [Claimant] exhibits a complex clinical picture. He has a history of presenting with Bipolar Disorder since a young age. Regarding possible symptoms of autism spectrum disorder, it was reported that [Claimant] developed language at a young age and did not present with unusual use of language as a young child. During the sessions with this examiner, [Claimant] consistently demonstrated good eye contact, and no oddities of speech, repetitive manners or preservative behaviors were noted. He willingly shared his latest animation clip with the examiner and it was quite involved and interesting. His parents said that he shows the clips on Youtube and the last one was said to have had over 10,000 hits. [Claimant] states that he has no friends but is interested in having them although he is not able to handle the appropriate social interaction to sustain a friendship. His difficulties with social interaction with peers reportedly started when he was in preschool. Given the available history and current data, the diagnoses of Bipolar Disorder and Asperger's Disorder are tendered at this time.

*Testimony of Mayra Mendez*

19. Mayra Mendez, Ph.D. is a contract consultant for the Service Agency. She consults with the Service Agency on issues regarding mental health and regional center eligibility. Dr. Mendez did not personally evaluate Claimant. She testified based on her review of records, including Dr. Kelly's written report. Based on her review of records, Dr. Mendez concurred with Dr. Kelly's diagnosis of Bipolar Disorder NOS and Asperger's Disorder. Dr. Mendez opined that Claimant did not meet the diagnostic criteria for Autistic Disorder. She also opined that Claimant was not eligible for regional center services under the fifth category. Because his cognitive abilities are in the average range, mental retardation is not a proper description of Claimant's condition. Claimant requires treatment for mental health issues; he does not require treatment similar to mental retardation.

*Testimony of Deborah Budding*

20. Claimant was evaluated by neuropsychologist Deborah Budding, Ph.D., ABPdN, ABN in February/March 2012. Dr. Budding observed Claimant in his classroom at school and had three meetings with him in her office for neuropsychological testing. Dr. Budding spent a total of 10 hours on the evaluation. A written report of Dr. Budding's evaluation was not presented at the hearing. However, the scoring sheets from the tests she administered were admitted as Claimant's Exhibit 11. Dr. Budding testified at the hearing.

21. (A) Dr. Budding's opinion is that Claimant is "very much on the autism spectrum" and has been on the autism spectrum since early childhood. Her testimony, however, was inconclusive on whether his diagnosis is Asperger's Disorder or Autistic Disorder. She testified it was "arguable" whether Claimant has Asperger's Disorder or Autistic Disorder. She noted that Claimant "was verbal at an early enough age that [she could] see where the Asperger's piece comes in." She did not administer the ADOS, but did administer the Behavior Assessment System for Children (BASC) and the Asperger's Syndrome Diagnostic Scale (ASDS), both of which yielded results that were "off the charts" for Asperger's.

(B) Dr. Budding testified that, in her opinion, Claimant also meets criteria for autism. Dr. Budding's conclusion is based on behavior she observed during testing and in his classroom, specifically, preservative behavior, hand flapping, and stimming, and the quality of his eye contact varied from looking away to overly intense. In addition, Dr. Budding noted that, although Claimant has a good vocabulary, he has always had problems in his ability to use language effectively, adaptively, and for problem solving in response to environmental demands. She found that Claimant's use of language was in some ways more about stimming and self-soothing than it was for communication per se.

(C) On cross-examination, Dr. Budding was asked to clarify if her opinion was that Claimant fell somewhere on the autism spectrum versus meeting

specific criteria as laid out in the DSM-IV-TR. Dr. Budding responded, "[Claimant] appears to meet behavioral criteria for both Asperger's and for Autism. The sticking point it seems has been on his language development. So whether or not you characterize him as classically autistic or as having Asperger's seems to be hinging on that piece. For me, as a neuropsychologist, this is something purely academic and misses the point of the rest of his presentation. I'm not the expert in the details of whether he meets the criteria for classic Autism or Asperger's as being the dividing line as to whether he receives services or not." Further, in earlier testimony, Dr. Budding explained that her evaluation of Claimant "was not so much to diagnose autism per se," since "he's been diagnosed with autism repeatedly over the years."

22. Dr. Budding opined that Claimant does not have deficits due to mental retardation. She did opine, however, that Claimant's condition could be described by the "fifth category." Claimant is impaired in his cognitive functioning, his ability to function independently, and in his problem-solving ability. Dr. Budding administered the WISC-IV and found Claimant had a full-scale IQ of 78, with subtest scores in the average range for verbal comprehension (score 99) and perceptual reasoning (score 100), and in the extremely low range for working memory (score 65) and processing speed (50).

*DSM-IV-TR*

23. The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association, also known as DSM-IV-TR) is a well respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders.[2]

24. The DSM-IV-TR diagnostic criteria for Autistic Disorder (299.00) are as follows:

> A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):
>
> > (1) qualitative impairment in social interaction, as manifested by at least two of the following:
> >
> > > (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

[2] Claimant's Exhibit 12 is an excerpt from the DSM-IV for Autistic Disorder. The ALJ, from her experience, is aware that the DSM-IV-TR is the current version of the Diagnostic and Statistical Manual of Mental Disorders and is available on-line at psychiatryonline.org. (Gov. Code, § 11425.5, subd. (c).) For purposes of this decision, the ALJ used the DSM-IV-TR.

(b) failure to develop peer relationships appropriate to developmental level

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)

(d) lack of social or emotional reciprocity

(2) qualitative impairments in communication as manifested by at least one of the following:

(a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)

(b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others

(c) stereotyped and repetitive use of language or idiosyncratic language

(d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

(3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

(a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus

(b) apparently inflexible adherence to specific, nonfunctional routines or rituals

(c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)

(d) persistent preoccupation with parts of objects

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder. (DSM-IV-TR, p. 75.)

25. The DSM-IV-TR diagnostic criteria for Asperger's Disorder (299.80) are as follows:

A. Qualitative impairment in social interaction, as manifested by at least two of the following:

(1) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

(2) failure to develop peer relationships appropriate to developmental level

(3) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest to other people)

(4) lack of social or emotional reciprocity

B. Restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

(1) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus

(2) apparently inflexible adherence to specific, nonfunctional routines or rituals

(3) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)

(4) persistent preoccupation with parts of objects

C. The disturbance causes clinically significant impairment in social, occupational, or other important areas of functioning.

D. There is no clinically significant general delay in language (e.g., single words used by age 2 years, communicative phrases used by age 3 years).

E. There is no clinically significant delay in cognitive development or in the development of age-appropriate self-help skills, adaptive behavior (other than in social interaction), and curiosity about the environment in childhood.

F. Criteria are not met for another specific Pervasive Developmental Disorder or Schizophrenia.

(DSM-IV-TR, p. 84.)

26. The DSM-IV-TR differentiates Asperger's Disorder from Autistic Disorder as follows:

[Asperger's Disorder] differs from Autistic Disorder in several ways. In Autistic Disorder there are, by definition, significant abnormalities in the areas of social interaction, language, and play, whereas in Asperger's Disorder early cognitive and language skills are not delayed significantly. Furthermore, in Autistic Disorder, restricted, repetitive, and stereotyped interests and activities are often characterized by the presence of motor

> mannerisms, preoccupation with parts of objects, rituals, and marked distress in change, whereas in Asperger's Disorder these are primarily observed in the all-encompassing pursuit of a circumscribed interest involving a topic to which the individual devotes inordinate amounts of time amassing information and facts. Differentiation of the two conditions can be problematic in some cases. In Autistic Disorder, typical social interaction patterns are marked by self-isolation or markedly rigid social approaches, whereas in Asperger's Disorder there may appear to be motivation for approaching others even though this is then done in a highly eccentric, one-sided, verbose, and insensitive manner. (DSM-IV-TR, p. 83.)

27. The DSM-IV-TR further states: "Asperger's Disorder is not diagnosed if criteria are met for Autistic Disorder." (DSM-IV-TR, p. 74.)

28. The DSM-IV-TR describes the qualitative impairment in communication required for Autistic Disorder as follows:

> The impairment in communication is also marked and sustained and affects both verbal and nonverbal skills. There may be delay in, or total lack of, the development of spoken language (Criterion A2a). In individuals who do speak, there may be marked impairment in the ability to initiate or sustain a conversation with others (Criterion A2b), or a stereotyped and repetitive use of language or idiosyncratic language (Criterion A2c). There may also be a lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level (Criterion A2d). When speech does develop, the pitch, intonation, rate, rhythm, or stress may be abnormal (e.g., tone of voice may be monotonous or inappropriate to context or may contain question like rises at ends of statements). Grammatical structures are often immature and include stereotyped and repetitive use of language (e.g., repetition of words or phrases regardless of meaning; repeating jingles or commercials) or idiosyncratic language (i.e., language that has meaning only to those familiar with the individual's communication style). Language comprehension is often very delayed, and the individual may be unable to understand simple questions or directions. A disturbance in the pragmatic (social use) of language is often evidenced by an inability to integrate words with gestures or understand humor or nonliteral aspects of speech such as irony or implied meaning. Imaginative play is often absent or markedly impaired. These individuals also tend not to engage in the simple imitation games or routines of infancy or early childhood or do so only out of context or in a mechanical way. (DSM-IV-TR, p. 70-71.)

29. The DSM-IV-TR diagnostic criteria for mental retardation are:

(1) significantly sub average intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test; (2) concurrent deficits or impairments in present adaptive functioning in at least two of 11 listed areas; and (3) the onset is before age 18 years. (DSM-IV-TR, p. 49.)

## LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)[3] A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-3.)

2. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) As no other statute or law specifically applies to the Lanterman Act, the standard of proof in this case is preponderance of the evidence. (See Evid. Code, §§ 115, 500.) Thus, Claimant has the burden in this case of proving his eligibility under the Lanterman Act by a preponderance of the evidence.

3. Eligibility for services under the Lanterman Act exists when an individual establishes that he or she suffers from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category ("disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation"). (§ 4512, subd. (a).) A qualifying condition must also onset before one's 18th birthday and continue indefinitely thereafter. (§ 4512; Cal. Code Regs., tit. 17, § 54000, subds. (a), (b)(1), and (b)(3).)

4. The determination of eligibility for services under the Lanterman Act is made by the regional center. "In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, the regional center may consider evaluations and tests, including but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources." (§ 4643, subd. (b).)

5. While the Legislature has not defined the fifth category, it does require that the qualifying condition be “closely related” (§ 4512, subd. (a)) or “similar” (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or “require treatment similar to that

[3] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

required for mentally retarded individuals." (§ 4512, subd. (a).) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" or "similar" to mental retardation, there must be a manifestation of cognitive or adaptive deficits, or both, which render that individual's disability like that of a person with mental retardation. Furthermore, determining whether a claimant's condition "requires treatment similar to that required for mentally retarded individuals" is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone's condition requires such treatment.

6. The Legislature has amended the Lanterman Act, including Welfare and Institutions Code section 4512, numerous times since it was first enacted and has chosen not to change the list of qualifying conditions to include other pervasive developmental disorders, also called "autistic spectrum disorders." The Legislature is apparently aware of the differentiation between autism and the other autistic spectrum disorders, as demonstrated by its enactment in 2001 of Welfare and Institutions Code section 4643.3, which refers to "autism disorder and other autistic spectrum disorders."[4] If the Legislature wanted to add other autistic spectrum disorders to the list of qualifying conditions under Welfare and Institutions Code section 4512, subdivision (a), it could have done so. It is a basic rule of statutory construction that, where the Legislature has utilized a term of art or phrase in one place and excluded it in another, it should not be implied where excluded. (*Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal.3d 564, 576.) Therefore, the term "autism" used in Welfare and Institutions Code section 4512, subdivision (a), refers only to autism and not the other autistic spectrum disorders, such as Asperger's Disorder.

7. In this case, Claimant has not established by a preponderance of the evidence that he has a diagnosis of autism that qualifies him for regional center services under the Lanterman Act. The preponderance of the evidence established that Claimant suffers from Bipolar Disorder and Asperger's Disorder, neither of which are qualifying conditions for regional center services. Dr. Budding's testimony was inconclusive and therefore insufficient to establish a qualifying diagnosis of Autistic Disorder. Further, under the DSM-IV-TR, Asperger's Disorder is not diagnosed if the criteria of Autistic Disorder are met. Claimant has been diagnosed with Asperger's Disorder since 2006.

8. Claimant has not established by a preponderance of the evidence that he has a diagnosis that qualifies him for regional center services under the fifth category. It was not established that Claimant has cognitive deficits that are due to a condition closely related to mental retardation. The full-scale IQ score obtained by Dr. Budding

[4] Section 4643.3, subdivision (a)(1), provides, in part: "[T]he department shall develop evaluation and diagnostic procedures for the diagnosis of autism disorder and other autistic spectrum disorders."

is not within the range of mental retardation, and her own testimony established that Claimant's deficits are not due to mental retardation.

9. Based on the foregoing, Claimant's appeal shall be denied. The present state of the evidence is not sufficient to establish Claimant's eligibility for services from the Service Agency on the basis of autism or the fifth category. (Factual Findings 1-29.)

## ORDER

Claimant's appeal of Westside Regional Center's determination that he is not eligible for services is denied.

DATED: May ___, 2012

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ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings

## NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.